The United States of America v Menteri Sumber Manusia & Ors and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 01(f)-18–10 OF 2021(W) AND 01(f)-19–10 OF 2021(W)
AZAHAR MOHAMED CJ (MALAYA), ZABARIAH MOHD AND HASNAH HASHIM FCJJ
20 JUNE 2022

International Law — Sovereign immunity — Application by foreign State — Malaysian security guard employed by American Embassy in Kuala Lumpur was summarily dismissed from employment without reason or notice of termination — Guard complained to Industrial Relations Department ('IRD') that dismissal was wrongful and sought reinstatement — Following inability of parties to reach settlement, IRD referred matter to Human Resources Minister who, in turn, referred dispute to Industrial Court ('IC') for adjudication — Embassy and American State successfully applied to High Court via judicial review to quash Minister's reference, prohibit IC from adjudicating on guard's claim and declare that Embassy and American State was immune from jurisdiction of IC — Whether Court of Appeal rightly set aside the decision — Whether the IC, and not judicial review proceedings, was the proper forum to determine if sovereign immunity applied — Whether Minister's reference to IC was legally proper and unassailable

The respondent, Subramaniam a/l Letchimanan ('R2') was a Malaysian employed as a security guard at the appellant's embassy in Kuala Lumpur ('the Embassy'). On 4 April 2008, he received a phone call from an officer of the Embassy stating that his employment had been terminated. No reason or formal notice of termination was given to him. Aggrieved over his dismissal, R2 filed a representation under s 20(1) of the Industrial Relations Act 1967 ('IRA') claiming that he had been unfairly dismissed and sought reinstatement to his former position. Since the Embassy and R2 could not come to a settlement, the Director-General of Industrial Relations referred R2's dispute to the first respondent ('R1') who, in turn, referred it to the Industrial Court ('IC') under s 20(3) of the IRA for adjudication. R1 took the view that the dispute raised serious questions of facts and law, especially whether the appellant/Embassy was entitled to claim sovereign immunity from the jurisdiction of the IC. Before the matter could be proceeded with in the IC, the appellant successfully applied to the High Court by way of judicial review ('JR') proceedings to quash R1's reference to the IC, prohibit the IC from adjudicating on R2's claim and declare that the appellant and the Embassy were immune from the jurisdiction of the IC. The appellant contended that R2's dismissal was a sovereign governmental act as it concerned the security affairs of the Embassy. Besides

agreeing with the contentions of the appellant, the High Court held that R1's reference to the IC was an error of law because the representation was frivolous and vexatious and involved no serious question of fact or law requiring trial. The Court of Appeal ('COA') allowed R1's and R2's appeal and set aside the High Court's decision. Inter alia, the COA held that: (a) the nature of R2's job and his dismissal were questions of fact that had to be decided by the IC when it was given threshold jurisdiction to do so by virtue of R1's reference under s 20(3) of the IRA; and (b) it was for the IC — and not for a judicial review application — to decide whether the restrictive doctrine of sovereign immunity applied and, consequently, whether or not the IC had jurisdiction to determine R2's claim.

Held, unanimously dismissing the appeals:

(1) R1's reference to the IC under s 20(3) of the IRA did not determine the question of immunity one way or the other. It merely conferred a threshold jurisdiction upon the IC to look into the representation and the serious issues it involved. The appropriate and only forum to determine the issue of immunity was the IC as a matter of first instance upon R1's reference (see para 39).

(2) Whether or not the restrictive doctrine of immunity applied depended on the facts and circumstances of a given case. The IC had the duty to carry out a fact-finding to determine if the immunity applied to exclude its jurisdiction. In the present case, the IC had not even commenced any hearing, let alone made any decision on the preliminary issue regarding the applicability of the restrictive doctrine of sovereign immunity. If a party was aggrieved, the proper recourse was to apply for judicial review of the decision of the IC after it had made a determination on that question (see paras 45–46).

(3) Whether immunity applied in the present case depended largely on the determination and findings of facts of the precise nature, duties and job scope of R2. The IC was the proper forum to decide that issue as well as the issue of R2's dismissal. The appellant ought to lead evidence as to whether what R2 performed had anything to do with functions related to the exercise of sovereignty of the appellant. R2 had deposed in an affidavit that his job at the Embassy was routine and menial in nature and similar to what his counterparts did in the private sector. He said his job did not involve diplomatic functions or governmental decisions of the appellant, that he had no access to confidential information or documents relating to the Embassy and/or the appellant and that there was no confidentiality clause in his employment contract. R2 contended that immunity should not be accorded to the appellant as his job functions had nothing to do

with the sovereign functions of the appellant and that his dismissal was purely an act of a private employer dismissing its employee (see paras 31 & 36–37).

(4) The COA was right in holding that R1's decision to refer R2's claim to the IC for adjudication under s 20(3) of the IRA was not tainted with illegality, irrationality or procedural irregularity. R1 had not erred in referring the dispute to the IC as the only question he had to consider in making the reference was whether the representation had raised a serious issue of fact and/or law that required adjudication by the IC. The COA did not err in setting aside the decision and orders of the High Court (see para 48).

[Bahasa Malaysia summary

Responden, Subramaniam a/l Letchimanan ('R2') adalah warga Malaysia yang bekerja sebagai pengawal keselamatan di kedutaan perayu di Kuala Lumpur ('Embassy'). Pada 4 April 2008, beliau menerima panggilan telefon daripada pegawai Kedutaan yang menyatakan bahawa pekerjaannya telah ditamatkan. Tiada sebab atau notis rasmi penamatan diberikan kepadanya. Terkilan dengan pemecatannya, R2 memfailkan representasi di bawah s 20(1) Akta Perhubungan Perusahaan 1967 ('APP') dengan mendakwa bahawa beliau telah dipecat secara tidak adil dan meminta pengembalian semula ke jawatannya dahulu. Memandangkan Kedutaan dan R2 tidak dapat mencapai penyelesaian, Ketua Pengarah Perhubungan Perusahaan merujuk pertikaian R2 kepada responden pertama ('R1') yang seterusnya merujuknya kepada Mahkamah Perusahaan ('MPh') di bawah s 20 (3) APP untuk adjudikasi. R1 berpandangan bahawa pertikaian tersebut menimbulkan persoalan serius mengenai fakta dan undang-undang, terutamanya sama ada perayu/Kedutaan berhak menuntut kekebalan kedaulatan daripada bidang kuasa MPh. Sebelum perkara tersebut boleh diteruskan dalam MPh, perayu berjaya memohon kepada Mahkamah Tinggi melalui prosiding semakan kehakiman ('SK') untuk membatalkan rujukan R1 kepada MPh, menghalang MPh daripada mengadili tuntutan R2 dan mengisytiharkan bahawa perayu dan Kedutaan adalah kebal daripada bidang kuasa MPh. Perayu berhujah bahawa pemecatan R2 adalah tindakan kerajaan yang berdaulat kerana ia melibatkan hal ehwal keselamatan Kedutaan. Selain bersetuju dengan pertikaian perayu, Mahkamah Tinggi berpendapat bahawa rujukan R1 kepada MPh adalah kesilapan undang-undang kerana representasi tersebut remeh dan menyusahkan serta tidak melibatkan persoalan serius fakta atau undang-undang yang memerlukan perbicaraan. Mahkamah Rayuan ('MR') membenarkan rayuan R1 dan R2 dan mengetepikan keputusan Mahkamah Tinggi. Antara lain, MR berpendapat bahawa: (a) sifat tugas R2 dan pemecatannya adalah persoalan fakta yang perlu diputuskan oleh MPh apabila ia diberi bidang kuasa ambang untuk berbuat demikian berdasarkan rujukan R1 di bawah s 20(3) APP; dan (b) ia adalah untuk MPh — dan bukan untuk permohonan semakan kehakiman — untuk memutuskan

sama ada doktrin sekatan imuniti berdaulat digunakan dan, akibatnya, sama ada MPh mempunyai bidang kuasa atau tidak untuk menentukan tuntutan R2. A

Diputuskan, sebulat suara menolak rayuan: B

(1) Rujukan R1 kepada MPh di bawah s 20(3) APP tidak menentukan persoalan imuniti satu cara atau yang lain. Ia hanya memberikan bidang kuasa ambang kepada MPh untuk meneliti representasi dan isu serius yang terlibat. Forum yang sesuai dan satu-satunya untuk menentukan isu imuniti ialah MPh sebagai perkara pertama atas rujukan R1 (lihat perenggan 39). C

(2) Sama ada atau tidak doktrin sekatan kekebalan yang digunakan bergantung pada fakta dan keadaan kes tertentu. MPh mempunyai kewajipan untuk menjalankan pencarian fakta untuk menentukan sama ada imuniti digunakan untuk mengecualikan bidang kuasanya. Dalam kes ini, MPh belum pun memulakan apa-apa pendengaran, apatah lagi membuat sebarang keputusan mengenai isu awal mengenai kebolehgunaan doktrin sekatan kekebalan berdaulat. Jika pihak terkilan, jalan yang sewajarnya adalah dengan memohon semakan kehakiman terhadap keputusan MPh selepas ia membuat penentuan mengenai soalan tersebut (lihat perenggan 45–46). D E

(3) Sama ada imuniti yang digunakan dalam kes ini bergantung pada penentuan dan dapatan fakta yang bersifat tepat, tugas dan skop kerja R2. MPh adalah forum yang sesuai untuk memutuskan isu tersebut serta isu pemecatan R2. Perayu hendaklah mengetuai keterangan sama ada apa yang dilakukan oleh R2 mempunyai kaitan dengan fungsi yang berkaitan dengan pelaksanaan kedaulatan perayu. R2 telah mengikrarkan dalam afidavit bahawa tugasnya di Kedutaan adalah rutin dan bersifat biasa dan sama seperti yang dilakukan oleh rakan sejawatannya di sektor swasta. Beliau berkata tugasnya tidak melibatkan fungsi diplomatik atau keputusan kerajaan perayu, bahawa beliau tidak mempunyai akses kepada maklumat sulit atau dokumen yang berkaitan dengan Kedutaan dan/atau perayu dan tiada klausa kerahsiaan dalam kontrak pekerjaannya. R2 menegaskan bahawa imuniti tidak sepatutnya diberikan kepada perayu kerana fungsi tugasnya tidak ada kaitan dengan fungsi kedaulatan perayu dan pemecatannya adalah semata-mata tindakan majikan swasta memecat pekerjanya (lihat perenggan 31 & 36–37) F G H

(4) MR adalah betul dalam berpendapat bahawa keputusan R1 untuk merujuk tuntutan R2 kepada MPh untuk adjudikasi di bawah s 20(3) APP tidak dicemari dengan kesalahan undang-undang, tidak rasional atau penyelewengan prosedur. R1 tidak tersilap merujuk pertikaian tersebut kepada MPh kerana satu-satunya persoalan yang perlu I

A dipertimbangkannya dalam membuat rujukan adalah sama ada representasi tersebut telah membangkitkan isu fakta dan/atau undang-undang yang serius yang memerlukan adjudikasi oleh MPh. MR tidak terkhilaf dalam mengetepikan keputusan dan perintah Mahkamah Tinggi (lihat perenggan 48).]

B

Cases referred to

Ashraf-Hassan v Embassy of France 610 Fed Appx 3; 2015 US App LEXIS 9001, CA (refd)

Ashraf-Hassan v Embassy of France 40 F Supp 3d 94; 2014 US Dist LEXIS C 53293 (refd)

Benkharbouche v Embassy of the Republic of Sudan (Secretary of State for Foreign and Commonwealth Affairs and others intervening) [2019] AC 777, SC (refd)

British High Commission v Jansen [2015] 3 LRC 565, SC (refd)

Commonwealth of Australia v Midford (Malaysia) Sdn Bhd & Anor [1990] 1 D MLJ 475, SC (refd)

Council of Civil Service Union & Ors v Minister of Civil Service [1985] AC 374, HL (refd)

Doe v Holy See 434 F Supp 2d 925; 2006 US Dist LEXIS 39998 (refd)

El-Hadad v Embassy of the UAE 69 F Supp 26 69; 1999 US Dist LEXIS 15948 E (refd)

El-Hadad v United Arab Emirates 496 F3d 658; 378 US App DC 67; 2007 US App LEXIS 17904, CA (refd)

Exxon Chemical (M) Sdn Bhd v Menteri Sumber Manusia, Malaysia & Ors [2007] 3 MLJ 1, FC (refd)

F *Hii Yii Ann v Deputy Commissioner of Taxation of The Commonwealth of Australia & Ors* [2018] 7 MLJ 393, HC (refd)

Holden v Canadian Consulate 92 F3D 918; 1996 US App LEXIS 20064, CA (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] G 1 MLJ 481, CA (refd)

Hyunhuy Nam v Permanent Mission of the Republic of Korea 2022 US Dist LEXIS 11896; 2022 WL 204619 (refd)

I Congreso del Partido [1981] 2 All ER 1064, HL (refd)

Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd [1997] 2 MLJ 685; [1997] H 3 CLJ 777, SC (distd)

Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-Sama Sebaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1, FC (refd)

Menteri Sumber Manusia v John Hancock Life Insurance (M) Bhd [2007] 2 MLJ 546, CA (refd)

I *Merlini v Canada* 926 F3d 21; 2019 US App, LEXIS 17313, CA (refd)

Minister of Labour v Lie Seng Fatt [1990] 2 MLJ 9, SC (refd)

Mohammad v General Consulate of the State of Kuwait et al 2020 US Dist LEXIS 244092; 2020 WL 7315345 (refd)

Mourmouni v Permanent Mission of the Republic of South Sudan to the United

Nations 2021 US Dist LEXIS 186217; 2021 WL 4461829 (refd)
Nizam of Hyderabad and Another v Jung and Others [1957] 1 All ER 257; [1958] AC 379, HL (refd)
Park v Shin 313 F3d 1138; 2002 US App LEXIS 25889, CA (refd)
R Rama Chandran v Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
Tei Yan Sun v Taiwan 201 F3d 1105; 2000 US App LEXIS 1326, CA (refd)
The Government of Canada v The Employment Appeals Tribunal and Burke 95 ILR 467, SC (refd)
The Minister of Human Resources v Thong Chin Yoong [2001] 4 MLJ 225, FC (refd)
United States of America v Zakhary [2015] FC J No 295, FC (refd)
Zveiter v Brazilian National Superintendency of Merchant Marine 833 F Supp 1089; 1993 US Dist LEXIS 14098 (refd)

Legislation referred to

Industrial Relations Act 1967 s 20, 20(1), (3)
Rules of Court 2012 O 53 r 3(2)
State Immunity Act [CN] s 9, 9(2)
Unfair Dismissals Act 1977 [CN]

Appeal from: Civil Appeal Nos W-01(A)-59–01 of 2020 and W-01(A)-66–1 of 2020 (Court of Appeal, Putrajaya)

Lim Heng Seng (with Chong Yue Han) (Lee Hishammuddin Allen & Gledhill) for the appellant.
Liew Horng Bin (Senior Federal Counsel, Attorney General's Chambers) for the first respondent.
Ragunath Kesavan (with Tai Yong Fung and Joshua Tan Jo-Ven) (Kesavan) for the second respondent.

Azahar Mohamed CJ (Malaya):

INTRODUCTION

[1] The two related appeals before this court raise an important issue in relation to the principle of restrictive doctrine of sovereignty immunity in an employment dispute.

[2] In essence, under the restrictive doctrine of sovereign immunity, immunity would not be granted if a sovereign state performs certain private acts or transactions which are commercial in nature. If the dispute brings into question for instance executive or governmental policy of the sovereign state, the court or tribunal should grant immunity if asked to do so, because it offends the dignity of a foreign sovereign to have the merits of such a dispute

canvassed in the domestic courts or tribunal of another country (see *Nizam of Hyderabad and Another v Jung and Others* [1957] 1 All ER 257; [1958] AC 379 at p 422, *I Congreso del Partido* [1981] 2 All ER 1064, *Commonwealth of Australia v Midford (Malaysia) Sdn Bhd & Anor* [1990] 1 MLJ 475 (SC), *Hii Yii Ann v Deputy Commissioner of Taxation of The Commonwealth of Australia & Ors* [2018] 7 MLJ 393 (HC)).

[3] The very important question this judgment sets out to address is whether, in the context of an employee's claim that he has been dismissed without just cause or reason by a sovereign state, the proper forum to decide the applicability of restrictive doctrine of sovereignty immunity should be at the Industrial Court or by way of judicial review proceedings in the High Court.

FACTUAL BACKGROUND

[4] The appellant is the United States of America, a sovereign state which has established a diplomatic mission, the Embassy of the United States of America in Kuala Lumpur ('Embassy'). On 29 September 1998, the second respondent, a Malaysian, was employed as a security guard at the Embassy by the appellant. The dispute in the present case arose when he was dismissed from his employment by the appellant on 4 April 2008. It was on that day he received a phone call from an official of the Embassy that his employment had been terminated. No reasons were given.

[5] The second respondent felt aggrieved that after serving for more than ten years he was terminated without notice and with no reasons given. On 23 May 2008 he filed a representation under s 20(1) of the Industrial Relations Act 1967 ('the IRA 1967') claiming his dismissal by the embassy was without just cause and excuse and seeking for reinstatement to his position as a security guard at the embassy ('s 20 claim'). At the material time, the second respondent as a dismissed employee has no direct access to the Industrial Court. Access was available only upon a reference by the Minister of Human Resources ie the first respondent to the Industrial Court. He may make a reference after efforts at conciliation by the Director General of Industrial ('DGIR') failed to arrive at a settlement. The DGIR files a report to the first respondent upon which the latter will decide whether the claim should be referred to the Industrial Court for adjudication on the question whether the dismissal was for just cause or excuse. The first respondent's reference conferred threshold jurisdiction upon the Industrial Court to enter into the adjudication of a s 20 claim. Without his reference, the Industrial Court would have no lawful authority to do so.

[6] Reverting to the facts of the present case, a conciliation meeting was held between the Embassy and the second respondent but no settlement was reached thereat.

[7] In point of fact, the first respondent then proceeded to consider the representation by the second respondent and was satisfied that: **A**

(a) the second respondent's representation raised serious questions of facts and laws that require adjudication;

(b) the issue concerning the claim of immunity by the Embassy is an issue of law that should be decided by the Industrial Court; and **B**

(c) the second respondent's representation is not frivolous and vexatious.

[8] Thereafter, vide a letter dated 22 April 2019 from the Industrial Relations Department, the Embassy was informed that the first respondent had decided to refer the second respondent's representation to the Industrial Court for adjudication ('first respondent reference'). This reference granted access to the second respondent and vested threshold jurisdiction upon the Industrial Court to hear his s 20 claim. **C** **D**

THE HIGH COURT PROCEEDINGS

[9] However, as it turned out, before the second respondent proceeded to file his s 20 claim at the Industrial Court, on 25th July 2019 the appellant filed an ex parte application to the High Court for leave to commence judicial review application in respect of the first respondent's reference seeking the following reliefs: **E**

(a) an order of certiorari to quash the first respondent's reference decision; **F**

(b) an order of prohibition to prohibit the Industrial Court from adjudicating on the second respondent's representation; and

(c) a declaration that the appellant and the Embassy are immune from the jurisdiction of the Industrial Court in respect of the second respondent's s 20 claim. **G**

[10] The grounds on which these reliefs were sought were set out in the appellant's statement filed pursuant to O 53 r 3(2) of the Rules of Court 2012. Primarily, the appellant anchored its case on the following grounds: **H**

(a) the first respondent failed to properly address his mind to the several factual matters of the second respondent's duties as a security staff pertinent to the question as to whether the second respondent's s 20 claim relates to activity of the appellant which is protected by sovereign immunity and is consequently not subject to the jurisdiction of the Industrial Court and/or IRA 1967; **I**

(b) the first respondent failed to inform himself of and to apply the customary international law pertaining to the question as to whether the

assertion of sovereign immunity applies to the second respondent's s 20 claim and had he done so, he would have arrived at the decision that sovereign immunity arose out of the exercise of the appellant's governmental or sovereign acts in the course of the administration of the security affairs of the Embassy; and

(c) the first respondent had failed to take into account relevant considerations pertaining to the applicability of the doctrine of sovereign immunity to the activity of the appellant upon which the second respondent's s 20 claim is based and that sovereign immunity arose out of the exercise of the appellant's governmental or sovereign acts in the course of the administration of the security affairs of the Embassy.

DECISION OF THE HIGH COURT WHICH IS THE SUBJECT MATTER OF THESE TWO APPEALS

[11] On 28 August 2019, the High Court allowed the appellant's leave application to commence judicial review proceedings.

[12] On 8 January 2020 at the hearing of the appellant's judicial review application, the High Court found in favour of the appellant. The High Court held that the core question to be determined in the judicial review application was whether the appellant and its Embassy were immune from the jurisdiction of the Industrial Court in respect of the second respondent's s 20 claim. The High Court made a finding that the second respondent's duty as a security guard is integral to the sovereign activity of the appellant and the Embassy. The dismissal of the second respondent by the appellant was in the exercise of its sovereign authority and as such the doctrine of sovereign immunity is applicable. Consequently, the Industrial Court has no jurisdiction to hear the second respondent's s 20 claim. Further, the High Court held that the first respondent committed an error of law in referring the representation to the Industrial Court because the representation is frivolous and vexatious and involves no serious question of facts or law to be tried. More importantly, the High Court decided that the appellant and the Embassy are immune from the jurisdiction of the Industrial Court in respect of the first respondent's s 20 claim by virtue of the restrictive doctrine of sovereign immunity.

[13] The High Court proceeded to issue: (a) certiorari order to quash the first respondent's reference; and (b) a prohibition order to prohibit the Industrial Court from adjudicating upon the second respondent's s 20 claim. Furthermore, the High Court granted a declaration that the appellant and its Embassy are immune from the jurisdiction of the Industrial Court in respect of the said claim.

[14] The first respondent filed an appeal against the whole of the High

Court's order. The second respondent also appealed.

DECISION OF THE COURT OF APPEAL

[15] The Court of Appeal took a diametrically opposite view. The Court of Appeal allowed both the appeals by both the first and second respondents and set aside the decision and order of the High Court.

[16] The Court of Appeal, inter alia, held:

(a) the nature of the second respondent's work as well as his dismissal is a question of fact where the proper forum to decide on such issue is in the Industrial Court;

(b) the determination of whether the restrictive doctrine of sovereign immunity applies can only be done after fact finding by the court of first instance ie the Industrial Court. Such issue ought not to be decided by way of judicial review;

(c) the Industrial Court, having seised with threshold jurisdiction, is empowered to determine whether it has jurisdiction to entertain the second respondent's s 20 claim; and

(d) the first respondent does not make decision on the nature of the second respondent's job and his dismissal. It is a question which can only be determined after due inquiry by the Industrial Court.

[17] Subsequently, the appellant filed two applications for leave to appeal to the Federal Court, which were allowed by the Federal Court on 30 September 2021.

Questions of law raised in these two appeals

[18] The Federal Court had allowed eight leave questions. In allowing the questions, the Federal Court directed that the questions be condensed. All parties have agreed that the eight leave questions to be condensed into the following three:

(a) question 1 — whether under common law, the restrictive doctrine of sovereign immunity applied to a claim pursued under s 20 of the Industrial Relations Act 1967 by a staff of a diplomatic mission who was dismissed on the ground of misconduct in the course of the diplomatic mission's internal disciplinary management of its staff ('s 20 claim') with the result that the Industrial Court will have no jurisdiction over the said claim?

(b) question 2 — whether the common law restrictive doctrine of sovereign immunity applies to a s 20 claim of a staff of a diplomatic mission employed in a security capacity whose duties pertain to the protection of its diplomatic staff and the maintenance of the inviolability of its diplomatic mission's premises with the result that the Industrial Court will have no jurisdiction over the said claim?; and

(c) question 3 — whether the Court of Appeal had erred in setting aside the decision and orders of the High Court, which was properly exercising its plenary judicial powers, its statutory judicial review powers and in accordance with the law laid down by the apex Supreme Court in *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685; [1997] 3 CLJ 777, to decide whether the appellant and her Embassy were immune from the jurisdiction of the Industrial Court in respect of the employee's s 20 claim?

[19] Questions 1 and 2 essentially relate to the nature, scope and applicability of the restrictive doctrine of sovereign immunity in the context of the dismissal of an employee, engaged as a security guard in a reference by the first respondent to the Industrial Court under s 20 of the IRA 1967 where the employer is a sovereign state.

[20] Question 3 raises a different point. This question in substance concerns whether the judicial review proceedings in the High Court is in fact the proper forum to decide the issue of restrictive doctrine of sovereign immunity.

[21] For convenient, I will first deal with question 3.

Contentions of parties in respect of question 3

[22] The contentions of the appellant can be summarised as follows. The core question for the High Court to decide is whether or not the Industrial Court had jurisdiction over the second respondent's s 20 claim. The second respondent was employed to work in a security capacity and his duties were not only to provide security but also to maintain the inviolability of the embassy's premises. Such was not merely auxiliary but was integral to the core sphere of sovereign activity. The High Court correctly decided in accordance with the law laid down in *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685; [1997] 3 CLJ 777 (SC) ('Kathiravelu'), the threshold jurisdiction question that sovereign immunity applied to the second respondent's s 20 claim. The Industrial Court is not the appropriate and only forum to decide the question of sovereign immunity. The High Court had not committed any appealable error that warranted its decision to be set aside by the Court of Appeal.

[23] The pivotal position of the first respondent is this. The scheme of the IRA 1967 makes it clear that it is only the Industrial Court which is conferred with an adjudicatory function. The first respondent cannot assume a function expressly reserved to the Industrial Court. If the representation raises serious questions of fact or law calling for adjudication, it ought to be referred to the Industrial Court since it is the only proper forum to adjudge such questions of fact or law. Whether restrictive doctrine of immunity applies is a question of law and would depend on a myriad of factors, principally on the nature (and not purpose) of employment. The proper forum to decide on such nature of the second respondent's job scope should be in the Industrial Court.

[24] The main contentions of the second respondent are as follows. Before determining whether restrictive doctrine of sovereign immunity applies in an employment dispute, it is imperative to note the distinction between employees who: (a) occupy positions implementing foreign and defence policies of the state, having contact with sensitive governmental material or performing roles with no private sectors equivalent would perform; and (b) perform largely routine or subordinate tasks where the nature of the work performed may be indistinguishable from that performed in the private sector. This distinction is wholly dependent on the facts and circumstances of each case. The proper forum to decide on the nature of the second respondent's job should be in the Industrial Court. This is because the dispute raised in the present case, which constitutes questions of fact and law, can only be decided upon proper and complete consideration of both oral and documentary evidence by the Industrial Court. Hence, the Industrial Court is the appropriate forum to decide on the question of sovereign immunity.

FINDINGS AND ANALYSIS

[25] In determining question 3, a key point to note and appreciate is that the present appeal stems from the decision of the first respondent to refer the representation made by the second respondent under s 20 of the IRA 1967 to the Industrial Court for adjudication. At all material times the relevant provision reads:

> 20. Representations on dismissals
>
> (1) ...
>
> (1A) ...
>
> (2) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at; where the Director General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly.
>
> (3) Upon receiving the notification of the Director General under subsection (2) the Minister may, if he thinks fit, refer the representations to the Court for an award.

[26] As can be seen under s 20 of the IRA 1967, the first respondent has the 'choice' to confer the threshold jurisdiction onto the Industrial Court to determine matters in which he deems fit. It must be noted that the recent amendments introduced by way of the Industrial Relations (Amendment) Act 2020 has effectively removed the element of 'choice' in conferring the threshold jurisdiction of the Industrial Court to determine matters referred to it. The present case therefore falls to be decided by reference to the pre-amended s 20 of the IRA 1967.

[27] It is very important now to look at closely how in law the first respondent should exercise his power under the pre-amended s 20 of the IRA 1967. As explained in the case of *Minister of Labour v Lie Seng Fatt* [1990] 2 MLJ 9 (SC), the first respondent has a wide and unfettered discretion under s 20(3) of the IRA 1967 whether to refer or not to refer a dispute to the Industrial Court provided he has acted bona fide, that is without any improper motive, and he has not taken into account extraneous or irrelevant matters. The discretion of the first respondent must be exercised in accordance with the intention of the IRA 1967 and must not frustrate the object of the statute. If the representation raises serious questions of fact or law calling for adjudication, it ought to be referred to the Industrial Court since it is the only proper forum to adjudge such questions of fact or law (see *The Minister of Human Resources v Thong Chin Yoong* [2001] 4 MLJ 225 (FC) at 231C-E). The first respondent is limited to ascertaining whether, on the facts and material placed before him, the representations raise serious questions of fact or of law calling for adjudication (see *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 (CA) and *Exxon Chemical (M) Sdn Bhd v Menteri Sumber Manusia, Malaysia & Ors* [2007] 3 MLJ 1 (FC)). Where there are mixed questions of law or fact arising from the representations the proper forum to decide on such issues would be the Industrial Court and not the first respondent (see *Menteri Sumber Manusia v John Hancock Life Insurance (M) Bhd* [2007] 2 MLJ 546 (CA)).

[28] The position in law is fairly well settled in that the first respondent's decision in relation to the exercise of his executive function under s 20 of the IRA 1967 may be reviewed by the court on grounds of illegality, irrationality, procedural impropriety or disproportionality (see *Council of Civil Service Union & Ors v Minister of Civil Service* [1985] AC 374, *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 (FC) and *Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-Sama Sebaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 (FC)).

[29] It is with the above principle in mind that brings me to this important question: was the first respondent wrong in law to have referred the dispute to the Industrial Court? This question must be approached on the basis of the

facts and material placed before him. As I have pointed out earlier at para [9] above, the appellant sought to apply for a judicial review of the decision of the first respondent to refer the second respondent's representation to the Industrial Court. The appellant, among others, had sought for a certiorari to quash the reference by the first respondent to the Industrial Court for adjudication of the second respondent's representation, and for a declaration that the appellant and its embassy are immune from the jurisdiction of the Industrial Court.

[30] In the first place, it is hard to deny that the question as to whether the dismissal of the second respondent as a security guard at the Embassy was a decision of the appellant made in its governmental function as a sovereign state and not a private or commercial matter and as such is entitled to sovereign immunity is in itself a serious and difficult question of law.

[31] Even more to the point, the second respondent averred in his affidavit that his responsibilities as a security guard at the Embassy were mere routine and menial in nature and were similar to his counterparts in the private sector. It was stated in the second respondent's affidavit that his job at all material times during his employment at the Embassy did not involve diplomatic functions or governmental decision of the appellant. The second respondent also did not have any access to the confidential information or documents relating to the Embassy and/or the appellant. There is also no confidentiality clause in the second respondent's contract of employment. The Embassy had made contributions to the Employee Provident Funds and Social Security Organisations for the benefit of the second respondent. The second respondent averred that the appellant's act of his dismissal was purely that of an employer and nothing more.

[32] As can be seen at para [2] above, what stands out as a matter of substance, in the case of restrictive doctrine of sovereign immunity, it is not all acts of the sovereign foreign state that is immune from legal action but only those acts that are primarily governmental or diplomatic in nature and character, or for example touching as it is on the legislative or international transactions of a foreign government, or the policy of its executive. This can only be decided after all the relevant facts have been ascertained. An inquiry has to be made to ascertain whether or not the action of the sovereign foreign state is within or outside that activity.

[33] In the present context, the learned senior federal counsel ('SFC') in resisting the appeal, emphasised the point that whether restrictive doctrine of immunity applies would depend on a myriad of factors to be decided based on available evidence and that the exercise is best undertaken by the Industrial Court. He has diligently provided a summary of the guiding principles

deduced from the United States case law as follows:

(a) a state engages in commercial activity where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns;

(b) a foreign sovereign's motives are immaterial to the analysis, the issue is whether the particular action performed, whatever the motive behind it, is the type of actions by which a private party engages in trade or commerce;

(c) a foreign state employer-employee relationship can be commercial depending upon the context; the question courts must ask is whether the activity is typical of a private party engaged in commerce;

(d) if there is nothing quintessentially governmental about the employee's work, the commercial exception applies; a court's inquiry in applying the commercial activity exception turns on the activity's nature as opposed to the purpose of the activity; and

(e) the employment of American citizens or third country nationals as civil service personnel by foreign state in the US is commercial activity and falls under the immunity exception; the only employment relationships of a foreign state that are governmental in nature are relationships with diplomatic, civil service, or military employees who are neither US citizens nor third country nationals employed in the US, the hiring of all other employees is commercial.

[34] Our attention was then drawn by the learned SFC to the following cases to support the above guiding principles: *Hyunhuy Nam v Permanent Mission of the Republic of Korea* 2022 US Dist LEXIS 11896; 2022 WL 204619; *Mourmouni v Permanent Mission of the Republic of South Sudan to the United Nations* 2021 US Dist LEXIS 186217; 2021 WL 4461829; *Mohammad v General Consulate of the State of Kuwait et al* 2020 US Dist LEXIS 244092; 2020 WL 7315345; *Merlini v Canada* 926 F3d 21; 2019 US App, LEXIS 17313; *El-Hadad v Embassy of the UAE* 69 F Supp 26 69; 1999 US Dist LEXIS 15948; *El-Hadad v United Arab Emirates* 496 F3d 658; 378 US App DC 67; 2007 U. App LEXIS 17904; *Ashraf-Hassan v Embassy of France* 40 F Supp 3d 94; 2014 US Dist LEXIS 53293; *Ashraf-Hassan v Embassy of France* 610 Fed Appx 3; 2015 US App. LEXIS 9001; *Doe v Holy See* 434 F Supp 2d 925; 2006 US Dist LEXIS 39998; *Park v Shin* 313 F3d 1138; 2002 US App LEXIS 25889; *Tei Yan Sun v Taiwan* 201 F3d 1105; 2000 US App LEXIS 1326, *Holden v Canadian Consulate* 92 F3d 918; 1996 US App LEXIS 20064; *Zveiter v Brazilian National Superintendency of Merchant Marine* 833 F Supp 1089; 1993 US Dist LEXIS 14098. The cases cited by the learned SFC do assist us in our deliberation.

[35] It is material to note that in opposing the appellant's judicial review application, the first respondent had stated in its affidavit that the issues raised in the present case relate to questions of fact and law which should be decided by the Industrial Court.

[36] From the foregoing discussion, it is clear that whether the restrictive doctrine of sovereign immunity applies in the present case would to a great extent depends on the determination and findings of facts of the precise nature, duties as well job scope of the second respondent. The proper forum to decide on this as well as the dismissal of the second respondent should be in the Industrial Court. What I mean by this is that it can only be decided upon proper and complete consideration of both oral and documentary evidence by the Industrial Court. The relevant evidence could only be more appropriately given at the Industrial Court where the matter would be heard and parties may cross-examine each other on the true nature of the second respondent's employment and the act of dismissal. The designation of the second respondent's job as a security guard at the Embassy alone is not sufficient and that the appellant ought to lead evidence as to whether what the second respondent performed had anything to do with functions related to the exercise of sovereignty of the appellant.

[37] To put the point differently, as noted earlier, the second respondent contended that he was merely performing auxiliary duties at the embassy which were not in any manner connected to the sovereign functions of the appellant and hence immunity should not be granted in this case. Whether that is true or otherwise is a matter eminently within the purview and scope of the Industrial Court's jurisdiction, as it is a mixed question of fact and law.

[38] The point is that, as correctly observed by the Court of Appeal, what we have in the judicial review application are averments which are being contradicted by the second respondent with respect to the nature of his employment or even the act of his dismissal as falling within or without the state's sovereign or governmental functions or whether these are more in the nature of a private employment contract and an alleged breach of its terms and the applicability of the IRA 1967 to determine whether the dismissal is for a just cause and excuse. The first respondent does not make decision on the nature and job scope of the second respondent and his dismissal.

[39] The reference by the Minister under s 20(3) of the IRA 1967 does not determine the question of immunity one way or another; it merely confers a threshold jurisdiction upon the Industrial Court to look into the representation and the serious issues it involves. The appropriate and only forum to determine the issue of immunity is the Industrial Court as a matter of first instance upon a reference by the first respondent.

[40] The above approach is consistent with other jurisdictions. Learned counsel for the second respondent has brought to our attention a number of cases where courts of various jurisdictions have taken similar position. I need not go through all the cases here. I would only refer to four cases.

[41] First is the United Kingdom Supreme Court case of *Benkharbouche v Embassy of the Republic of Sudan (Secretary of State for Foreign and Commonwealth Affairs and others intervening)* [2019] AC 777. The claimants in that case were hired by the domestic embassies in London to cook, clean, do the laundry, shopping and serving at meals. Upon their dismissal from their employment, the claimants filed their claim at the Employment Tribunal for unfair dismissal. The respondents raised state immunity which was upheld by the Employment Tribunal. The claimants appealed to the Employment Appeal Tribunal where the claimants' appeal against the Employment Tribunal's decision was allowed. The matter was further appealed to the Court of Appeal and later the Supreme Court, both of which affirmed the decision of the Employment Appeal Tribunal. The Supreme Court held that the claimants' job scope was 'an act of a private law character such as anyone with the necessary resources might do'.

[42] The second case is the Canadian case of *United States of America v Zakhary* [2015] FCJ No 295. The respondent in that case had filed an unjust dismissal complaint after the United States consulate ('the Consulate') terminated her employment as a cashier. An inspector of Ministry of Labour sent the complaint to the Consulate by registered mail but did not serve it in accordance with s 9(2) of the State Immunity Act. A human resources officer for the Consulate responded by acknowledging receipt and stating that the Consulate stood by its decision. Given that the respondent's attempt to mediate the dispute was in vain, the complaint was then referred to an adjudicator. The applicant responded that service was defective, hence it is not a party and would not respond. The adjudicator found that the human recourses officer's response to the complaint constituted waiver of the right to object to service under s 9 of the State Immunity Act, given it was a response that did not raise a claim of immunity. The adjudicator then proceeded with proceeding and found that respondent worked in a purely administrative position so the activity was commercial and outside the scope of state immunity. The applicant applied to set aside the certificate of filing of order in which the Federal Court had allowed the said application. The Federal Court decided that on the facts the respondent's duties as a cashier falls within the financial operation of the consulate which that involves elements of trust and confidentiality.

[43] The third case is *British High Commission v Jansen* [2015] 3 LRC 565 where the Supreme Court of Sri Lanka held that sovereign immunity applied in

an unlawful dismissal suit filed against the British High Commission by its former security assistant who had been dismissed after he was found sleeping while on duty. This was because the former employee's duties were not only to provide security but also to maintain the inviolability of the embassy's premises which could not be classified as merely auxiliary but were integral to the core sphere of sovereign activity. However, it must be noted that the matter had come to the Sri Lanka Supreme Court after a finding of fact by the Labour Tribunal and a further appeal to the High Court. The appellant had pleaded immunity from the jurisdiction and took no part in the proceedings. Whilst the Tribunal considered that the application could not proceed the High Court nevertheless held that the express reference to local labour laws in the letters of appointment amounted to waiver of immunity.

[44] The last case is *The Government of Canada v The Employment Appeals Tribunal and Burke* 95 ILR 467. The case involved an Irish citizen who was employed by Canada as a chauffeur with the Canadian Embassy in Dublin. He was dismissed and he brought a claim against Canada before the Employment Appeals Tribunal under the Unfair Dismissals Act 1977. Canada objected on the ground that the Tribunal did not have jurisdiction to hear the claim. The Tribunal rejected the argument and proceeded with the claim and awarded compensation. Canada then proceeded with a judicial review application in the High Court for a writ of certiorari. Though Canada failed at the High Court, it succeeded at the Supreme Court. The Supreme Court held that the doctrine of restrictive immunity was applicable. It was further held that as a result of the trust and confidentiality required, a bond was created between the chauffeur and his employers which involved the employer in governmental activity. Thus, Canada was protected from the suit by the doctrine of State immunity. It has to be noted that the matter had come before the High Court by way of a judicial review application after the Employment Appeals Tribunal had decided the matter.

[45] The cases that I have discussed above demonstrated that the respective Employment Tribunals or adjudicator had the opportunity to consider the facts of the respective cases and the evidence adduced thereat in order to decide on whether such doctrine of 'sovereign immunity' applies. Whether restrictive doctrine of immunity applies would depend on the facts and circumstances of the particular case. The Industrial Court, as is the case with Employment Tribunals in other jurisdictions, has the duty to embark on a fact-finding to determine if the restrictive doctrine of sovereign immunity applied to exclude its jurisdiction.

[46] As to the case of *Kathiravelu*, the factual matrix can be contrasted with the present case. There, the Supreme Court set aside the order of the High Court and remitted the case back to the Industrial Court for it to be heard on

its merits. The Industrial Court then did decide on the preliminary issue as it was a mixed question of law and fact before being prevented to do so by the grant of a prohibition order by the High Court pursuant to a judicial review application. It was not a case like the present case where there the High Court and then the Supreme Court, by way of an appeal to it, had heard by way of a judicial review the reference by the first respondent. In our present case the Industrial Court had not even commenced any hearing yet let alone made any decision on the preliminary issue regarding the applicability of restrictive doctrine of sovereign immunity. If a party is aggrieved, the proper recourse is to apply for judicial review against the Industrial Court after the Industrial Court has made a determination on that question.

CONCLUSION

[47] Based on all the above reasoning, question 3 must be answered in the negative. In the circumstances, it is unnecessary to answer questions 1 and 2.

[48] Accordingly, I agree with the Court of Appeal that the decision of the first respondent cannot be said to be tainted with illegality, irrationality or procedural impropriety. The first respondent had not erred in referring the dispute to the Industrial Court in exercising his discretion under s 20(3) of the IRA 1967, as the only question to be considered by him is whether the representation raises a serious issue of fact and/or law to be adjudicated by the Industrial Court. There is no appealable error on the part of the Court of Appeal in setting aside the decision and order of the High Court. Both the appeals are therefore dismissed with no order as to costs.

[49] My learned sisters Zabariah Mohd Yusof FCJ and Hasnah Mohammed Hashim FCJ have read this judgment in draft and have agreed that it be the judgment of this court.

Appeals dismissed.

Reported by Ashok Kumar